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MEMORANDUM FOR TAXPAYER ADVOCATE SERVICE EMPLOYEES

FROM: /s/ Nina E. Olson
National Taxpayer Advocate

SUBJECT: Interim Guidance on Handling Collection Cases where
Economic Hardship is Present but the Taxpayer has not
Filed all Required Returns

The purpose of this memorandum is to provide guidance to Taxpayer Advocate Service (TAS) employees on collection cases involving taxpayers with economic hardships and unfiled returns. These circumstances were discussed in a recent Tax Court opinion, [*Vinatieri v. Commissioner*](#), 133 T.C. No.16 (Dec. 21, 2009). The Tax Court held that if, during a Collection Due Process (CDP) levy hearing, the taxpayer establishes that the proposed levy will create an economic hardship, the IRS **cannot** proceed with the proposed levy action, even if the taxpayer has not filed all returns that are due.

During the CDP hearing, Ms. Vinatieri submitted financial information to support her claim that she could not pay an outstanding income tax liability. The Appeals officer found that although she established economic hardship (within the meaning of IRC § 6343(a)(1)(D)), he could not place her account in a Currently Not Collectible (CNC) status because she had not filed two income tax returns. Instead, the Appeals officer issued a notice of determination sustaining the proposed levy action. The Tax Court held that as a matter of law, the Appeals determination to proceed with a levy was wrong. IRC § 6343 requires the release of a levy if the taxpayer is experiencing an economic hardship, even if the taxpayer has not filed all returns. The court also held that rather than proceeding with the levy, the Appeals officer should have considered alternatives to the proposed levy action.

Note: IRC § 6343(a)(1)(D) states that a levy shall be released if “the Secretary has determined that such levy is creating an economic hardship due to the financial condition of the taxpayer”. Treasury Regulation § 301.6343-1(b)(4), defines economic hardship as when: *“The levy is creating an economic hardship due to the financial condition of an individual taxpayer. This condition applies if*

satisfaction of the levy in whole or in part will cause an individual taxpayer to be unable to pay his or her reasonable basic living expenses. The determination of a reasonable amount for basic living expenses will be made by the director and will vary according to the unique circumstances of the individual taxpayer. Unique circumstances, however, do not include the maintenance of an affluent or luxurious standard of living.”

TAS employees need to advocate for the taxpayer suffering from economic hardship when the IRS has issued a notice of levy or a Final Notice of Intent to Levy, but the IRS will not place the account in CNC status or release a levy because of unfiled returns. Most TAS cases will be in the Automated Collection System (ACS), but could also involve a Revenue Officer or Appeals (either in the form of a Collection Appeal Program (CAP) conference or CDP hearing).

A more detailed discussion of relevant IRC sections, regulations, and IRM references for assistance in case building and advocating for taxpayers are included in the attachment to this memorandum.

Attach a copy of the *Vinatieri* opinion and use Special Case code LE when making these arguments to the IRS. If the IRS disagrees and does not provide a compelling reason to support its disagreement, immediately elevate the case to a manager for consideration of a taxpayer assistance order (TAO). Also, consider whether referral to a Revenue Officer Technical Advisor (ROTA) may also be appropriate. However, remember that often “time is of the essence” in these cases, and a TAO may be necessary so the taxpayer is not further harmed.

Attachment 1

RELEASE OF LEVY AND PREVENTING DETERMINATIONS TO PROCEED WITH LEVY

If a notice of levy or Final Notice of Intent to Levy is issued, submit an operations assistance request (OAR) to the appropriate Collection function advising them:

- 1) The levy or proposed levy action should not go forward and all existing levies must be released immediately per IRC § 6343(a)(1)(D). Neither the IRC nor the regulations require the taxpayer to file delinquent returns to obtain a release of levy on the grounds of economic hardship.
- 2) Even if the IRS has not actually levied, the court in *Vinatieri* held it is unreasonable for the IRS to proceed with a levy if the taxpayer's has an economic hardship.

Note: Be sure to include full documentation of the taxpayer's economic hardship. See [Internal Revenue Manual \(IRM\) 5.19.4.4.10\(4\)\(j\)](#), *Levy Release: General Information*.

- 3) [IRM 5.19.4.4.10\(4\)\(j\)](#) provides that where the "financial analysis shows that the taxpayer merits a full or partial levy release to relieve economic hardship, the taxpayer has a statutory right to enough relief to end the hardship. We cannot refuse, delay or understate the release amount as a means to secure other compliance, e.g., missing tax returns. The levy release should be faxed."

Be aware that some portions of the IRM and the Electronic ACS guide may appear to contradict [IRM 5.19.4.4.10\(4\)\(j\)](#), *Levy Release: General Information* which explicitly require the IRS employee to secure all delinquent returns before releasing the levy.

If the IRS cites any of these provisions or other authority in support of its refusal to release a levy (or its determination to proceed with a levy) where the taxpayer has demonstrated economic hardship but has not filed required returns, explain that the cited provision is inconsistent with the Code, the regulations, and the *Vinatieri* decision and therefore should not be followed. If the IRS employee still refuses to release the levy, elevate the case for consideration of the issuance of a TAO directing the IRS to release the levy immediately.

PLACING THE TAXPAYER'S ACCOUNT INTO CNC STATUS

If a taxpayer is experiencing economic hardship and meets the requirements for placement in CNC status, but has not filed all required returns, send an OAR to the appropriate Collection function advising:

- 1) Based on the facts of the case, the account should be put into CNC status.

Attachment 1

- 2) Explain that the facts establish economic hardship and that CNC status is appropriate.

Note: See the note above for provisions pertaining to economic hardship.

- 3) Point out that some IRM provisions do not explicitly require the securing of unfiled returns before placing an account in CNC status, even though they refer to compliance checks or require that delinquent return modules be “resolved.” Examples of these provisions are:
 - [IRM 5.16.1.1\(5\)](#), *Currently Not Collectible Policy and Procedure Overview*, which states: “Conduct a compliance check and document the results in the case history in circumstances when the taxpayer is contacted;”
 - [IRM 5.16.1.1\(6\)](#), *Currently Not Collectible Policy and Procedure Overview*, which states: “All open filing requirements or Delinquent Return (Del Ret) modules must generally be resolved and closed appropriately when reporting an account CNC.”
- 4) Always address how the delinquent return modules can be **resolved**, even if returns cannot be secured. For example:
 - IRM 5.19.2-2, *Policy Statement P-5-133, Little or No Tax Due*, provides for closing a return delinquency without securing a return.
 - IRM 5.1.11.7.3, *Option C — No Return Secured Taxpayer Not Required To File For This Period Only*, also explains how to close a return delinquency without securing the tax return. If TAS can substantiate the taxpayer has no filing requirement for a given year, this is another means of **resolving** the accounts in the case.
 - [IRM 5.1.11.6.1 \(8\)](#), *Enforcement Determination*, is another basis for closing a return delinquency without securing the tax return. It reads in part: “service employees will apply prudence when it is clear from information available that the non-filer does not have or will not have the ability to pay some if not all of the potential tax liability...”

If the IRS employee cites a conflicting manual or other source and refuses to place the account in CNC status, immediately elevate the case to a manager for consideration of a taxpayer assistance order (TAO). Also, consider whether referral to a Revenue Officer Technical Advisor (ROTA) may also be appropriate. However, remember that often “time is of the essence” in these cases, and a TAO may be necessary so the taxpayer is not further harmed.